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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program

Rulemaking 04-04-026
(Filed April 22, 2004)

**AMENDED PETITION FOR MODIFICATION OF D.04-06-014 OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)
AND SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)
REGARDING STANDARD TERMS AND CONDITIONS REQUIRED
FOR RENEWABLES PORTFOLIO STANDARD CONTRACTS**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. JUSTIFICATION FOR TIMING OF PETITION FOR MODIFICATION	2
III. BACKGROUND OF RPS STANDARD TERMS AND CONDITIONS	3
IV. TO PROMOTE RPS DEVELOPMENT, EVOLUTION OF RPS CONTRACTS AND COMMERCIALLY REASONABLE FLEXIBILITY IS NECESSARY	5
A. Overview of Need for Relief and Proposed Remedy.....	5
B. Revision of the Standard Terms and Conditions is Needed to Facilitate RPS Contracting and Reduce Contract Review Uncertainties And Burdens	7
1. Restrictions on Negotiations are Counter-Productive and Should be Lifted, Except for Definitions Needed for Trading and to Establish Final Commission Approval	9
2. To Promote Transparency and Efficient Solicitation Negotiations, Any Remaining Modifiable Standard Terms and Conditions Should be Updated Annually.....	10
C. Recommendations to Ensure Standard Terms and Conditions Reflect RPS Contracting Experience, Promote Successful RPS Contract Formation and Provide for Efficient, Effective RPS Contract Approval Processes	11
1. To Avoid Delay to RPS Contract Negotiations and Inefficient Use of Commission Resources, an Expedited Review Process is Needed to Address Universal Changes to Non-Negotiable Standard Terms and Conditions	11
2. Changes to any Modifiable Standard Terms & Conditions Should be Reviewed in Tandem with the Annual RPS Plan Process	12
D. Clarification of the RPS Contract Approval Process Will Reduce Uncertainty and Promote RPS Development	14
V. CONCLUSION.....	16

I. INTRODUCTION

In 2004, the Commission adopted standard terms and conditions for Renewables Portfolio Standard (“RPS”) contracts, stating that these terms were intended to “develop a ‘year one’ contract to enable the RPS solicitation to move forward,” with the “expect[ation] that the contract language will become more refined as the parties and the Commission gain further experience.”¹ The Assigned Commissioner and Administrative Law Judge (“ALJ”), when establishing the framework for the first RPS contracts, also recognized that experience might support revisiting the determination that some terms and conditions should not be subject to negotiation.² The set of standard terms and conditions established for the onset of the RPS program provided a useful structure to guide development of early RPS contracting efforts. However, like bracing for a young tree, binding structures that are helpful or even essential for early stages of growth can inhibit healthy growth in later stages of maturity.

The experience of Pacific Gas and Electric Company (“PG&E”) and Southern California Edison (“SCE”)³ (collectively, Petitioners),⁴ as well as of the renewable energy sellers⁵ has been that restrictions on negotiation of standard terms and conditions has hindered, not helped, progress towards RPS goals, slowing negotiations and reducing the appeal of the California

¹ Decision (“D.”) 04-06-014, *mimeo*, at p. 6 (June 2004); see also Joint Ruling of Assigned Commissioner and Administrative Law Judge Regarding Procedure for Adoption of Standard Terms and Conditions at p. 2 (March 2004) (the “Joint Ruling”).

² Joint Ruling at p. 6.

³ Pursuant to Rule 1.8(d) of the Commission’s Rules of Practice and Procedure, SCE has authorized PG&E to execute this pleading on its behalf.

⁴ Attachment A to this amended petition consists of the declaration of PG&E.

⁵ Attachment B to this amended petition consists of the declaration of Calpine. Sellers’ experience is also reflected in the comments of the Center for Energy Efficiency and Renewable Technologies (“CEERT”) and the Independent Energy Producers Association (“IEP”) on the originally-submitted Petition for Modification and in CEERT’s comments on the proposed decision of Administrative Law Judge (“ALJ”) Mattson on that petition.

marketplace to RPS development. For these reasons, Petitioners submit this amended Petition for Modification pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure.

Petitioners request the following three modifications to the Commission's approach to standard terms and conditions for RPS contracts:

1. Reducing the non-negotiable standard terms to: the definitions of Green Attributes, Renewable Energy Credits ("RECs"), and CPUC Approval;
2. Elimination of all other standard terms and conditions, or, in the alternative, conversion of the remaining non-negotiable terms and conditions to modifiable provisions and elimination of current modifiable standard terms and conditions; and,
3. Clear, expedited processes for reviewing subsequent changes to standard terms and conditions.

The remainder of this amended petition provides detail on the Petitioners' proposals, and on the reasons that these proposals will further the Commission's goals for the RPS program, including enhancing the growth of renewable energy in California.

II. JUSTIFICATION FOR TIMING OF PETITION FOR MODIFICATION

Commission Rule 16.4(d) requires that petitions for modification filed more than one year after the effective date of the decision at issue must be accompanied by a justification for the timing of the petition. At the time of the Joint Ruling and the issuance of D.04-06-014, the Commission expressly recognized the potential for revisiting the RPS standard terms and conditions as the program developed and experience was gained with those terms and conditions, as noted above.⁶

The issues for which Petitioners now seek clarification and modification have developed over time, through experience with the RPS contract negotiation and approval process as well as the continual evolution of the RPS program, technology, and the commercial and legal environment in which RPS contracts are executed. As this petition is intended to address

⁶ Joint Ruling at p. 6.

concerns that have arisen through the experience anticipated by the Commission, and as that experience could not have been reflected in a petition for modification filed within one year, the timing of this petition is justified.

III. BACKGROUND OF RPS STANDARD TERMS AND CONDITIONS

The initial RPS statute, Senate Bill (“SB”) 1078, required the Commission to adopt standard terms and conditions for RPS contracts.⁷ The development of these standard terms and conditions was the subject of extensive proceedings, which culminated in the Joint Ruling and D.04-06-014.⁸ As noted by the Joint Ruling, the term “standard” is subject to multiple interpretations, and “the statute provides minimal guidance” as to its intended meaning in this context.⁹

Consensus on the standard terms and conditions was not reached by the parties to the proceedings, but two primary groups coalesced:¹⁰ the “CEERT Parties”¹¹ and the “CalWEA Parties.”¹² Both of these groups, as well as individual parties that included SCE and Solargenix, supported an interpretation of the term “standard” that would allow all terms to be changed through negotiations by the contracting counterparties, although some advocated limitations to protect RPS developers against the bargaining weight of the utilities.¹³ These parties raised concern, as recognized by the Joint Ruling, that “immutable standard terms may frustrate

⁷ Pub. Util. Code § 399.14(a)(2)(D) (SB 107 subsequently amended this provision, but did not change any aspects of the provision pertinent to the issues addressed herein).

⁸ See D.04-06-014, *mimeo*, at p. 2.

⁹ Joint Ruling at pp. 4-5.

¹⁰ D.04-06-014, *mimeo*, at p. 4.

¹¹ Comprised of CEERT, IEP, PG&E, San Diego Gas & Electric Company (“SDG&E”) and The Utility Reform Network (“TURN”).

¹² Comprised of the California Wind Energy Association (“CalWEA”), the California Biomass Energy Alliance (“CBEA”), and Vulcan Power Company.

¹³ Joint Ruling at pp. 3-6.

commercial transactions by making it more difficult and costly for a supplier to bid its services, or by preventing a utility from accommodating the sellers' needs.”¹⁴

Ultimately, the Joint Ruling determined that the standard terms and conditions should fall into one of two categories: those for which “no negotiation w[ould] be allowed,” and those for which negotiations would be permissible.¹⁵ The Joint Ruling acknowledged that the “general concept” of the CEERT Parties and the CalWEA Parties “to simultaneously allow for negotiation but to control the negotiation process” had “merit” and could be the subject of further consideration, but declined to adopt that approach at that time.¹⁶

D.04-06-014 subsequently ratified the Joint Ruling’s approach to standard terms and conditions,¹⁷ and approved the proposal for specific terms and conditions of the CEERT Parties, with certain modifications.¹⁸ In response to the CEERT Parties’ comments on the draft decision, the Commission identified which of the standard terms “could be modified by the parties through negotiation,”¹⁹ by adding the phrase “may not be modified” to each clause not subject to negotiation.²⁰ The intention of the Commission for the future of the standard terms and conditions at the time they were adopted could not have been more clear: as noted in the introduction to this amended petition, the Commission stated that the standard terms and conditions were intended to “develop a ‘year one’ contract to enable the RPS solicitation to

¹⁴ *Id.* at p. 3.

¹⁵ *Id.* at p. 6.

¹⁶ *Id.*

¹⁷ D. 04-06-014, *mimeo*, at p. 16.

¹⁸ *Id.* at pp. 4-6.

¹⁹ D. 04-06-014, *mimeo*, at p. 16 (stating, in pertinent part: “The CEERT Parties, SCE, and the CalWEA Parties note that a Joint Ruling issued on March 8, 2004 (in R.01-01-024) identified which terms and conditions could be modified by the parties through negotiation, but the draft decision omits that identification. Consistent with the March 8 Joint Ruling, Appendix A now indicates the negotiability of each standardized term and condition.”)

²⁰ *See id.*, Appendix A.

move forward,” with the “expect[ation] that the contract language will become more refined as the parties and the Commission gain further experience.”²¹

IV. TO PROMOTE RPS DEVELOPMENT, EVOLUTION OF RPS CONTRACTS AND COMMERCIALLY REASONABLE FLEXIBILITY IS NECESSARY

RPS contracting experience has developed substantially since 2004. As a result, many of the standard terms and conditions initially adopted by the Commission are no longer necessary or should be subject to modification when appropriate. The Petitioners are not alone in this belief; sellers have also come to the conclusion, based on their experience, that restrictions on modification should be reconsidered.²² Petitioners recommend narrowing the scope of the standard terms and conditions, as well as elimination of the bar on modification of all but three of the currently non-negotiable terms and conditions. The process for future revisions, and for review of RPS contracts, must also be clarified to provide the supportive regulatory environment essential to promoting RPS development and attainment of the Commission’s RPS goals.

A. Overview of Need for Relief and Proposed Remedy

RPS contracting experience to date has shown that a non-negotiable, cookie-cutter approach to standard terms and conditions, with the exception of only the most essential definitions requiring uniformity, does not serve RPS goals well. Rigid provisions simply do not neatly fit the increasingly diverse technology, project, and financing needs of otherwise-viable

²¹ Id. at 6; see also Joint Ruling at p. 2.

²² See declarations in Attachments A and B; CEERT, “Response of the Center for Energy Efficiency and Renewable Technologies to the Petitioners Petition for Modification of Decision 04-06-014” at p. 5 (Feb. 28, 2007) (“CEERT Petition Response”); CEERT, “Comments of the Center for Energy Efficiency and Renewable Technologies on the Proposed Decision of ALJ Mattson” at pp. 2-4 (June 8, 2007) (“CEERT PD Response”); and IEP, “Independent Energy Producers Association’s Comments on Petition for Modification of D.04-06-014 of Pacific Gas and Electric Company (U 39 E) and Southern California Edison Company (U 338-E) Regarding Standard Terms and Conditions Required for Renewables Portfolio Standard Contracts” at p. 2 (Feb. 28, 2007) (“IEP Petition Response”).

renewable energy projects.²³ The inability of such rigid provisions to meet the demands of renewable energy projects and their financiers impedes prompt and successful contract formation.²⁴ Substantive changes that prove necessary to reach agreement on RPS contracting can be made to non-negotiable provisions,²⁵ but at the cost of a more complex Commission review process and increased resource demand on the Commission and all parties, as well as uncertainty and risk of delay that can discourage renewable energy development.

Attainment of the RPS goals will require the efficient, focused and streamlined efforts of RPS-obligated entities, RPS developers, and the Commission. To reduce the standard terms and conditions to those truly needed for uniformity, eliminating the undue resources and attention consumed by the overly-restrictive current set of terms and conditions and allowing their redirection to successfully concluding RPS contract negotiations, Petitioners recommend that the Commission provide the following modifications to the standard terms and conditions adopted by D.04-06-014 (as subsequently amended):

1. Retain the definitions of “Green Attributes” and “Renewable Energy Credits” (“RECs”) as non-negotiable provisions, to ensure the consistency of product necessary to allow use RECs for RPS compliance, as well as the definition of “CPUC Approval”; and,
2. Eliminate all other standard terms and conditions, or, in the alternative, retain the remaining current non-negotiable provisions as “modifiable” provisions, and eliminate standardization of all currently “modifiable” terms and conditions.

Petitioners further request that the Commission provide explicit mechanisms for evaluation and approval of changes to standard terms and conditions. There are three categories of such changes: a) changes to non-negotiable standard terms and conditions intended for universal application; b) changes to modifiable standard terms and conditions intended for use in annual

²³ See declarations in Attachment A.

²⁴ *Id.*

²⁵ D. 07-02-011, *mimeo*, at pp. 49-50.

solicitation negotiations (if such terms and conditions are retained); and c) changes to non-negotiable standard terms and conditions that are intended for a case-specific application.

Petitioners propose an expedited process to address proposed universal changes in non-negotiable standard terms and conditions, to allow prompt response to changes of law that would otherwise have to be addressed on a resource-intensive case-by-case basis. For any remaining modifiable standard terms and conditions that need updating for solicitation negotiations, Petitioners propose adapting the mechanism used successfully to implement SB 107 changes, which were considered in tandem with the annual RPS solicitation package review. Lastly, for case-specific changes to non-negotiable standard terms and conditions, Petitioners ask that the Commission merely confirm its decision in D. 07-02-011 in this regard, *i.e.*, that RPS contracts containing such changes can be considered by advice letter unless such changes “raise an important issue (based on a protest or as identified by Energy Division).”²⁶

B. Revision of the Standard Terms and Conditions is Needed to Facilitate RPS Contracting and Reduce Contract Review Uncertainties And Burdens

The dynamic and innovative nature of RPS technologies and projects, and the resulting individual needs of their developers and financiers, requires a flexible approach.²⁷ Reasonable changes to standard terms and conditions must be accommodated to ensure project financing and the ultimate success of desirable RPS projects.²⁸ Rigid, non-negotiable terms cannot keep pace with changes in law, financial market requirements, or RPS developments, and may be neither

²⁶ D. 07-02-011, *mimeo*, at p. 49 (Petitioners note that the discussion in D. 07-02-011 on this point suggests that a change in a modifiable standard term and condition could also trigger the need for review by application. Petitioners respectfully note that modifiable standard terms and conditions should be treated on an equal basis with any other contract terms and conditions; *i.e.*, as they can be modified by the parties, they should only trigger enhanced review if the changes are so unusual as to raise issues of very serious and substantial concern).

²⁷ *See* declarations in Attachments A and B.

²⁸ *Id.*

commercially justified nor logically tailored to the project at issue.²⁹ In the face of such terms, the time required for renewables contracting can be extended, rather than shortened,³⁰ and the viability of RPS projects that could further all of the goals of the RPS program can be needlessly threatened.³¹

The primary public interest served by the RPS program is the increase in renewable energy at the most reasonable cost. These goals must not be subsumed in the name of consistency that neither buyers nor sellers continue to want,³² particularly when the Commission relied on those buyers and sellers to determine the level of consistency desirable to achieve the ends of the RPS program.

Buyers and sellers have both come to the conclusion that removal of the restrictions on negotiability of RPS terms and conditions is critical to reaching timely and successful RPS contracts³³ The Commission, at the time it adopted the standard terms and conditions, reaffirmed the central role of market participants in identifying the correct balance to be struck on such terms, expressly reaffirming its prior conclusion that “[t]he type and level of detail that is required for fully developing standard terms and conditions is something that falls better within the ability of the parties to determine, rather than the Commission.”³⁴ The Joint Ruling noted the potential desirability of greater flexibility (even with respect to otherwise non-negotiable terms) and expressly identified this issue as a potential subject for future Commission action.³⁵

²⁹ See CEERT Response to Petition at p. 3; IEP Response to Petition at p. 2; Declarations in Attachments A & B.

³⁰ See CEERT Response to Petition at p. 3; Declarations in Attachments A & B.

³¹ See Declarations in Attachment A.

³² CEERT Response to Petition at p. 3; CEERT Response to PD at p. 2; IEP Response to Petition; Declarations in Attachments A & B.

³³ CEERT Response to Petition at p. 3; IEP Response to Petition; Declarations in Attachments A & B

³⁴ D. 04-06-014, *mimeo*, at p. 2 (*quoting* D. 03-06-071, *mimeo*, at p. 56).

³⁵ Joint Ruling at p. 6.

In light of the experience that both buyers and sellers have gained in their negotiations with RPS developers, and the needs that both buyers and sellers see to improve RPS contract negotiations and formation, the time to allow greater flexibility is now.

1. Restrictions on Negotiations are Counter-Productive and Should be Lifted, Except for Definitions Needed for Trading and to Establish Final Commission Approval

Petitioners recommend removal of the restriction on negotiations of all terms and conditions, excluding the definitions of Green Attributes, RECs, and CPUC Approval. The need for a “*parens patriae*” approach has been alleged, protecting RPS developers from agreeing to terms that they might not like. Sellers neither need nor want this protection; they prefer greater flexibility to tailor contracts to their specific needs.³⁶

Petitioners have noted the types of changes that have been required to the non-negotiable terms and conditions in the table presented in Attachment C to this pleading. These changes are not material to the public policy concerns that are central to the RPS program: they were made primarily to enable contract formation, and thus promote rather than impede renewable energy development; they were generally made to accommodate renewable developer needs, and at the very least were acceptable to the developers; and they do no harm consumers or their interests. The Commission’s review of these changes, which were necessary to reach agreement on valuable RPS contracts, absorbed the Commission’s and the parties’ time and resources even though the substance of the changes had little or no impact on issues of importance to the Commission. This elevation of process over substance, and the inefficiency and delay it produces, does not serve the Commission or the RPS program well. The table in Attachment C, entitled “Table of Issues Regarding Standard Terms and Conditions (“STCs”) Currently

³⁶ CEERT Response to Petition at p. 3; CEERT Response to PD at p. 2; IEP Response to Petition; Declaration in Attachment B.

Designated ‘May Not Be Modified,’” further identifies the reasons that Petitioners believe the identified terms and conditions should neither be non-negotiable nor standardized.

2. To Promote Transparency and Efficient Solicitation Negotiations, Any Remaining Modifiable Standard Terms and Conditions Should be Updated Annually.

Petitioners believe that the Commission should do away with the modifiable standard terms and conditions, as their sole true function is to allow transparency of the terms and conditions used to start negotiations, and that function is already fully served through the *pro forma* RPS contracts incorporated in the annual RPS Plans, served on all parties, issued to RPS developers through the RPS solicitation packages and discussed at the bidders’ conference in at which developers can pose questions. If the Commission decides to retain the concept of modifiable terms and conditions, their purpose would be undermined if they are not updated annually in the *pro forma* RPS contracts.

Initiating annual RPS solicitations with *pro forma* RPS contracts containing stale terms and conditions defeats the goal of transparency that solicitation packages are intended to serve, and wastes precious negotiation time. False starts are of no benefit to any party in contract negotiations. The Commission has mandated that the IOUs incorporate “lessons learned” from RPS contracting experience in their compliance with RPS requirements;³⁷ when that experience supports improvement in modifiable standard terms and conditions, the IOUs would be irresponsible to not seek contracts that reflect that improvement. If the *pro forma* contracts included in the solicitation packages issued by IOUs do not include the improvements, RPS developers will be denied the advanced notice of those improvements that would better prepare

³⁷ See, e.g., Scoping Memo and Ruling of Assigned Commissioner Peevey, Attachment C, at p. 2 (Aug. 21, 2006).

them for negotiations, and take up time in negotiations used to explain the differences between the *pro forma* contracts and the language that the IOUs seek agreement upon.

C. Recommendations to Ensure Standard Terms and Conditions Reflect RPS Contracting Experience, Promote Successful RPS Contract Formation and Provide for Efficient, Effective RPS Contract Approval Processes

Petitioners propose the following recommendations to adjust the current set of standard terms and conditions to meet ongoing RPS program goals and support RPS contracting needs, as well as to provide clear mechanisms for review and approval of future universal and contract-specific changes.

1. To Avoid Delay to RPS Contract Negotiations and Inefficient Use of Commission Resources, an Expedited Review Process is Needed to Address Universal Changes to Non-Negotiable Standard Terms and Conditions

Parties that have identified a necessary or desirable change to a standard term or condition that would provide universal benefits should be encouraged to bring the proposed change to the Commission's attention promptly, and an expedited review process should be available to consider that change and, if beneficial, adopt it promptly to facilitate on-going, time-critical RPS contract negotiations. Changes will inexorably occur that affect RPS contracting issues, whether a Commission decision on greenhouse gas, a statutory change on RPS or environmental matters, or court decision on contracting. When such changes occur, RPS contract formation may be affected immediately. The availability of a mechanism to address such changes promptly will avoid inefficient, case-by-case evaluation of potentially inconsistent proposed changes in individual contracts, and the accompanying uncertainty that would be detrimental to the RPS program.

Petitioners propose that the scoping memo for the RPS implementation proceeding include the review of emerging issues affecting standard terms and conditions as a standing item.

Parties could then, by motion, identify the need for a change to a non-negotiable term and propose specific language to address the concern, with responses due within 20 days. At the discretion of the Administrative Law Judge, a workshop to discuss the issue could be held if requested in the initial motion, or in responses. A proposed decision should be issued within 30 days after responses are due or after the workshop, if one is held. This process would provide efficiency for the Commission and all parties, enabling greater focus of resources on successfully completing RPS contract negotiations, and providing the regulatory certainty that is needed to inspire confidence in the California RPS marketplace

2. Changes to any Modifiable Standard Terms & Conditions Should be Reviewed in Tandem with the Annual RPS Plan Process

The Commission's recent experience with changes required to implement SB 107 provides a useful model to address changes in any modifiable standard terms and conditions the Commission may choose to retain. This process coincided with the Commission's review of the annual RPS Plans, enabling ALJ Mattson to provide for incorporation of the approved changes relating to SB 107 into the final *pro forma* RPS contracts that are included in the annual plans and distributed to RPS developers, after the plans are approved, in the annual solicitation packages.

As a result of that process, in which ALJ Mattson solicited recommendations for changes to standard terms and conditions needed to adjust to the legislation and all interested parties could provide comments, the RPS developers received solicitation packages that seamlessly incorporated the standard terms and conditions changed to implement SB 107. The burden on RPS developers to keep up with RPS proceedings was substantially reduced by providing a single proposed decision that they would need to review and comment upon in order to have an impact on the *pro forma* RPS contracts that form the basis of RPS contract negotiations, rather

than one proceeding for the SB 107 changes and a second proceeding for changes identified in the *pro forma* RPS contracts.

Petitioners propose that if the Commission decides to continue to require the use of modifiable standard terms and conditions, the process used for the SB 107 changes be adapted to allow updating of those modifiable standard terms and conditions to reflect RPS contracting experience. As with the SB 107 implementation process, the IOUs would identify proposed changes to the modifiable standard terms and conditions, including red-lined and clean versions of the proposed language to clearly indicate the changes as well as brief descriptions of the reasons for the proposed change.

Rather than create separate pleadings, which would increase the burden to RPS developers by increasing the number of documents and proceedings to track, changes to modifiable standard terms and conditions would be clearly identified within the Annual RPS Plans, which RPS developers would look to in order to review the *pro forma* RPS contracts that IOUs propose to use for that year's solicitation. RPS developers, and all other parties, could submit a single set of comments on the *pro forma* contracts, including proposed changes to modifiable standard terms and conditions, and allow the Commission to review those changes in context and at one time.

This approach is consistent with the Scoping Memo and Ruling of the Assigned Commissioner setting forth requirements for the 2007 Annual RPS Plans, which required the Annual RPS Plans to incorporate "lessons learned" from RPS contracting experience,³⁸ as well as with the Commission's expressed expectation that "contract language will become more refined as the parties and the Commission gain further experience."³⁹ It would expedite RPS

³⁸ *Id.*

³⁹ D.04-06-014, *mimeo*, at p. 6.

contract negotiations and contract formation, as improvements identified in each cycle could be fully incorporated in the *pro forma* RPS contracts that form the basis of negotiations, rather than starting negotiations with outdated language and having to begin discussion of the underlying issues anew each time. As with the SB 107 process, all who desired to participate in the development of the proposed changes could do so, and the final RPS solicitation packages that RPS developers receive would be complete and accurately representative of the language to be negotiated. RPS developers would be spared the need to track a separate RPS procedural process, and could focus on the single aspect of the proceeding that has the most direct impact on their impending negotiations.

D. Clarification of the RPS Contract Approval Process Will Reduce Uncertainty and Promote RPS Development

Uncertainties on the contract approval process and the likely time at which a Commission decision should be expected can chill RPS contract formation, particularly due to time-sensitive financing arrangements;⁴⁰ such uncertainties can add to contract costs, to the detriment of consumers.⁴¹ As discussed above, Petitioners ask that the Commission confirm its decision in D. 07-02-011 in this regard, i.e., that RPS contracts containing such changes can be considered by advice letter unless such changes “raise an important issue (based on a protest or as identified by Energy Division).”⁴² There are no compelling reasons why variations from standard terms and conditions should not be approvable through the advice letter process.

To an even greater extent than for RPS-obligated entities, who are acutely aware of the 2010 target, time is often of the essence for RPS developers and their financiers.⁴³ The prospect

⁴⁰ See declarations in Attachment A.

⁴¹ Id.

⁴² D. 07-02-011, *mimeo*, at p. 49.

⁴³ See declarations in Attachment A.

that changing terms will divert approval from the advice letter process to the potentially much-longer application process is simply commercially unacceptable for many RPS developers and financiers.⁴⁴ Moreover, it creates risks for RPS developers that are inconsistent with the Commission's policy to promote RPS development.

The uncertainties inherent in the application process can substantially reduce the likelihood of RPS success and increase the costs of RPS contracts, for several reasons. The online date of an RPS project may well be delayed by the mere possibility that the application process may take a protracted amount of time, as sellers' reluctance to invest further resources in their projects, including commitment to equipment or other binding expenditures, increases in proportion to potential delay in the anticipated approval date.⁴⁵

During a lengthy approval process, potential for changes in cost inputs to RPS projects also increase. These inputs include, but are not limited to, the expiration of tax credits (limiting the ability of the project to take advantage of such credits); changes in commodity prices (e.g., steel, cranes, labor), and changes in availability of increasingly-scarce renewable generation equipment.⁴⁶ These factors, and the concomitant increase in risk to sellers, may contribute to increased financing costs.⁴⁷

The end result of such delays and uncertainties is higher prices to buyers, as sellers can be expected to seek to recover their potential increases in costs as well as a premium to account for their increased risk. If RPS developers and financiers cannot assuage their concerns sufficiently through increased prices, the developers may well offer their often-scarce renewable

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

equipment and financing to other, more accommodating markets competing for renewable projects.

The slippages in online dates, increases in contract pricing, lost opportunities and increase in perception of difficulty of project approval in California could cause substantial harm to the RPS program and its chances for success. The approval of RPS contracts through the advice letter process and Commission resolution would reduce these risks to a minimum, while providing ample procedural protection, remaining fully consistent with the Commission's policy on the contract approval process,⁴⁸ and reducing the administrative burden of the RPS program.

V. CONCLUSION

The Commission anticipated that the approach to the standard terms and conditions adopted by the Joint Ruling and D.04-06-014 would need adjustment to fit the needs and experience of the RPS program as it developed. The general approach adopted by D.04-06-014 has served the program well, but increased flexibility, consistent with the theme of SB 107, has emerged as a necessity to allow changes in standard terms and conditions to conform to law, project specifics, developer financing needs, and the commercial needs of desirable RPS projects whose viability depends on such changes.

Allowing adjustments to all RPS standard terms and conditions, excluding the definitions of CPUC Approval, Green Attributes and RECs, and providing clear mechanisms for approval of universally-applicable and case-specific changes to standard terms and conditions, would improve the efficiency of the RPS process and provide increased comfort with the California RPS regulatory environment to the RPS marketplace. RPS-obligated entities will be better able

⁴⁸ D.05-01-032, *mimeo*, at pp. 8-10.

to “focus on seeking and signing the best possible contracts for renewable energy” that the Commission desires⁴⁹ if the Commission grants the relief requested by this petition, i.e.:

1. Reducing the non-negotiable standard terms to: the definitions of Green Attributes, RECs, and CPUC Approval;
2. Elimination of all other standard terms and conditions, or, in the alternative, conversion of the remaining non-negotiable terms and conditions to modifiable provisions and elimination of current modifiable standard terms and conditions; and,
3. Clear, expedited processes for reviewing subsequent changes to standard terms and conditions.

These modifications and clarifications will enhance the ability of RPS-obligated entities to attain the 20% target, and promote the ultimate success of the RPS program overall.

Petitioners therefore request that the Commission adopt the modifications to the Findings of Fact, Conclusions of Law and Ordering Paragraphs proposed in Attachment D. In the alternative, if after reviewing any responses that may be filed to this amended petition for modification, the Commission determines that further exploration of the issues addressed herein would be advisable, Petitioners request that the Commission order a workshop be held in either of the two ongoing RPS proceedings at the earliest possible date, to promote continued and

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⁴⁹ D.06-10-050, *mimeo*, at p. 13 (quoting D.06-05-039, *mimeo*, at p. 29, in turn citing D.05-07-039, *mimeo*, at p. 12).

timely progress on RPS contract negotiations and formation and to reduce the continued administrative burden of case-specific changes currently imposing upon counterparties and Commission resources alike.

Respectfully submitted,

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Dated: June 15, 2007

ATTACHMENT A

DECLARATION OF JAMES D. SHANDALOV

I, James D. Shandalov, declare:

1. I am presently employed by Pacific Gas and Electric Company (“PG&E”), and have been an employee at PG&E since 2004. My current title is Principal in PG&E’s Energy Supply Department. In this position, my responsibilities include negotiating power purchase agreements (“PPAs”) with counterparties in the business of producing electric energy from renewable energy resources, as part of PG&E’s efforts to comply with California’s Renewables Portfolio Standard (“RPS”). In carrying out these responsibilities, I have acquired knowledge of PG&E’s contracts with such sellers and the negotiation of such transactions.

2. Based on my experience and the concerns that renewables sellers have expressed to me and/or to others at PG&E, I make the following statements:

a. It is very important for PG&E to have flexibility to negotiate all PPA terms, except for the Renewable Energy Credit (“REC”), Green Attributes, and CPUC Approval definitions. This flexibility is necessary to assure that the terms of the PPA meet the varying and evolving needs of renewable energy facilities and their developers and financiers, and the innovative technologies that renewable energy facilities often employ.

b. PG&E supports standardizing the definitions of RECs and Green Attributes, to allow for a uniform REC product that can be traded, as well as the definition of CPUC Approval.

c. PG&E believes that the standardization of terms (other than the definitions of RECs, Green Attributes, and CPUC Approval), and in particular the restrictions on modification of other terms, has restrained progress on successful completion of RPS contracts and at times threatened the viability of otherwise desirable renewable energy projects, causing undue frustration to both buyers and sellers. PG&E believes that these disadvantages outweigh any benefits from standardization of terms other than the definitions of RECs, Green Attributes, and CPUC Approval, and threaten the primary goal of the RPS program, which is to attain the RPS target of renewable energy deliveries.

d. PG&E has found that non-negotiable terms lead to a more difficult and protracted PPA negotiation for renewable energy facilities. The rigidity of non-negotiable terms consumes a significant amount of time, diverting resources from the work needed to finalize RPS PPAs.

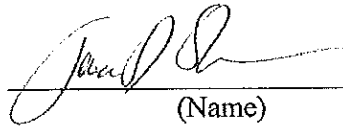
e. PG&E has found that non-negotiable provisions can, and have, made meeting the needs of diverse and developing RPS technologies more difficult.

- f. PG&E has been informed that non-negotiable terms can make, and have made, financing for some renewable energy projects more difficult and more expensive.
- g. PG&E has found that negotiations for renewable energy facilities are faster and more efficient if negotiations begin with terms and conditions that are updated to reflect lessons learned from renewable energy contracting experience.
- h. PG&E has experienced frustration, and has been informed by renewables sellers of their frustration, with the need to incorporate standard terms and conditions that neither applicable to the RPS contract under negotiation nor commercially justified
- i. PG&E has found that the modification to non-negotiable terms and conditions has at times proven necessary to successfully complete RPS contract formation with otherwise desirable renewable energy projects that, based on PG&E's solicitation evaluation criteria, appeared to be viable in all other respects.
- j. PG&E has been informed that time is of the essence in many RPS contract negotiations, and has been told that equipment and financing availability for renewables projects is time-sensitive.
- k. PG&E has found that renewables sellers have sought increased contract pricing as a result of increased financing and other cost inputs associated with delays in contract formation and approval related to difficulties with non-negotiable terms and conditions.
- l. PG&E has been informed by renewables sellers that uncertainty as to CPUC approval of RPS contracts, and the time at which approval could be expected, has threatened the availability and/or cost of financing, which PG&E has been informed is often time-sensitive.
- m. PG&E has been informed that the prospect of the long review times that can occur with the CPUC's application process was commercially unacceptable for RPS contracts under consideration. PG&E has also been informed that the online date of renewables projects can be delayed if the effective date of the contract is postponed.
- n. PG&E believes that sellers can and have been hesitant to invest resources in their projects, including commitment to equipment or other binding expenditures, in the face of uncertainty as to the anticipated contract approval date.
- o. PG&E understands that changes in cost inputs to RPS projects can occur between the time that contracts are executed and the time that they receive CPUC approval, and that the risk of these costs worsening increases with the length of time between these dates. The costs that may increase include, but are not limited to, the expiration of tax credits (limiting the ability of the project to take advantage of such credits); changes in commodity prices (*e.g.*, steel, cranes, labor), and changes in availability of increasingly-scarce renewable generation equipment.

p. PG&E has found that non-negotiable terms can make, and have made, successful development of RPS projects more difficult, primarily due to complications associated with assignment, including refinancing.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Executed on June 15, 2007 at ORINDA, California.


(Name) JAMES D. SHANDAW

PRINCIPAL
(Title)

ATTACHMENT B

DECLARATION OF MIKE ROGERS

I, Mike Rogers, declare:

1. I am the Senior Vice President of the West Region for Calpine Corporation, and I make this declaration in support of the Amended Petition for Modification with respect to the Standard Terms and Conditions for power purchase agreement contracts ("PPAs") with renewable energy facilities intended to contribute towards California's Renewables Portfolio Standard ("RPS").

2. Calpine Corp. is the developer of Geysers Power Company, and has over 20 years of experience in developing renewable energy facilities. I have experience in negotiating PPAs, including experience in negotiating PPAs for renewable energy facilities to contribute towards California's RPS program.

3. Based on my experience, and the experience of Calpine Corp., I make the following statements:

a. It is very important for renewable energy facility developers to have flexibility to negotiate all PPA terms, except for the Renewable Energy Credit ("REC") and Green Attributes definitions. This flexibility is necessary to assure that the terms of the PPA meet the varying and evolving needs of the facilities and their developers and financiers, and the innovative technologies that renewable energy facilities often employ.

b. Calpine Corp. supports standardizing the definitions of RECs and Green Attributes to allow for a uniform REC product that can be traded. We do not support standardizing any terms and conditions other than the definitions of RECs and Green Attributes.

c. Non-negotiable terms lead to a more difficult and protracted PPA negotiation for renewable energy facilities. The rigidity of non-negotiable terms makes conforming PPAs to the needs of developers and financiers much more difficult, and consumes a significant amount of time, diverting resources from the work needed to finalize RPS PPAs. The imposition of non-negotiable terms makes PPAs with buyers who must use them less attractive.

d. Non-negotiable terms can make financing for some renewable energy projects more difficult and more expensive.

e. PPA negotiations for renewable energy facilities are faster and more efficient if negotiations begin with terms and conditions that are updated to reflect lessons learned from renewable energy contracting experience.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Executed on June 13th, 2007 at San Francisco, California.

A handwritten signature in black ink, reading "Mike Rogers", is written over a horizontal line.

Mike Rogers

Senior Vice President

ATTACHMENT C

ISSUES REGARDING STANDARD TERMS AND CONDITIONS (“STCs”)
CURRENTLY DESIGNATED AS “MAY NOT BE MODIFIED”

STC #¹	STC	STC Language With Proposed Changes Identified²	ISSUES
1	CPUC Approval	<p>“CPUC Approval” means a final and non-appealable order of the CPUC, without conditions or modifications unacceptable to the Parties, or either of them, which contains the following terms:</p> <p class="list-item-l1">(a) <u>ap</u> approves this Agreement in its entirety, including payments to be made by the Buyer, subject to CPUC review of the Buyer’s administration of the Agreement; <u>;</u></p> <p class="list-item-l1">(b) finds that any procurement pursuant to this Agreement is procurement from an eligible renewable energy resource for purposes of determining Buyer’s compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 et seq.), Decision 03-06-071, or other applicable law; <u>and</u></p> <p class="list-item-l1">(c) <u>finds</u> that any procurement pursuant to this Agreement constitutes incremental procurement or procurement for baseline replenishment by Buyer from an eligible renewable energy resource for purposes of determining Buyer’s compliance with any obligation to increase its total procurement of eligible renewable energy resources that it may have pursuant to the California Renewables Portfolio Standard, CPUC Decision 03-06-071, or other applicable law; <u>and</u> <u>;</u></p> <p>CPUC Approval will be deemed to have occurred on the date that a CPUC decision containing such findings becomes final and non-appealable.</p>	<p><u>Issues</u>: No substantive changes required.</p> <p><u>Proposal</u>: Petitioners propose retaining designation of this provision as “may not be modified.”</p>

¹ Per Decision (“D.”) 04-06-014

² Comparing standard terms and conditions set forth in D. 04-06-014 against changes to the standard terms and conditions that have been previously proposed or are being proposed as part of this amended petition. Many of the changes that appear in this attachment have been previously approved by the Commission in D. 07-02-011.

ATTACHMENT C

STC #	STC	STC Language With Proposed Changes Identified	ISSUES
2	Definition and Ownership of RECs	<p>“Environmental<u>Green</u> Attributes” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Unit(s)Project, and its displacement of conventional energyEnergy generation.</p> <p>Environmental<u>Green</u> Attributes include but are not limited to <u>Renewable Energy Credits, as well as</u>: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), <u>nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride</u> and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, <u>or otherwise by law</u>, to contribute to the actual or potential threat of altering the Earth’s climate by trapping heat in the atmosphere; and (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser’s discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tags are accumulated on kWha <u>MWh</u> basis and one Green Tag represents the Environmental<u>Green</u> Attributes associated with one (1) MWh of energy. Environmental<u>Energy</u>. <u>Green</u> Attributes do not include (i) any energyEnergy, capacity, reliability or other power attributes from the Unit(s)Project, (ii) production tax credits associated with the construction or operation of the energy projectsProject and other financial incentives in the form of credits, reductions, or allowances associated with the projectProject that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or “tipping fees” that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular pre-existingpreexisting pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Unit(s)Project for compliance with local, state, or federal operating and/or air quality permits. If Seller’s Unit(s)the Project is a biomass or landfill gas facility and Seller receives any tradable Environmental<u>Green</u> Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Environmental<u>Green</u> Attributes to ensure that there are zero net emissions associated with the production of electricity from such facility.<u>the Project</u>.</p>	<p><u>Issues</u>: The substantive changes to the definition previously referred to as “Environmental Attributes,” now “Green Attributes,” the addition of the definition for “Renewable Energy Credit”, and the substantive changes to the conveyance provision resulted from SB 107 and were approved in D. 07-02-011, as modified by D. 07-05-057. These changes are reflected in the revisions.</p> <p>The definition of Green Attributes will likely be affected by changing greenhouse gas requirements adopted by the Commission and/or enacted under state or federal law, along with other changes in environmental and/or environmental law. Petitioners propose a clear, expedited process for considering and adopting such changes.</p> <p>The provision specifying conveyance of Green Attributes requires the Seller to convey the entirety of the Green Attributes related to the project. However, if Renewable Energy Credits (“RECs”) are adopted for compliance, Load Serving Entities may wish to procure separately energy, capacity and Green Attributes, and sellers may wish that flexibility to optimize their sales. This flexibility would enhance opportunities for renewable energy project development, and would not harm any Commission interest. Thus, Petitioners are proposing changes to the conveyance provision.</p> <p><u>Proposal</u>: Petitioners propose retaining the designation of “may not be modified” for the definitions of “Green Attributes” and “Renewable Energy Credit.” Petitioners propose a clear, expedited process to address anticipated changes in environmental and RPS law.</p> <p>Petitioners also propose elimination of the Green Attributes conveyance provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>

ATTACHMENT C

		<p><u>“Renewable Energy Credit” has the meaning set forth in Public Utilities Code Section 399.12(g), as may be amended from time to time or as further defined or supplemented by [I][L]aw.</u></p> <p>“3.4 — Environmental<u>3.2 — Green</u> Attributes. Seller hereby provides and conveys all Environmental<u>Green</u> Attributes from the Unit(s)Project to Buyer as part of the Product being delivered, as such term is described in the applicable Transaction confirmation for the period set forth in such confirmation. Seller represents and warrants that Seller holds the rights to all Environmental<u>Green</u> Attributes from the Unit(s)Project, and Seller agrees to convey and hereby conveys all such Environmental<u>Green</u> Attributes to Buyer as included in the delivery of the Product from the Unit(s).<u>Project.</u></p>	
3	SEP Awards, Contingencies	<p><u>“Seller Termination Right. If “Seller Termination Right” is specified as being “Applicable” on the Cover Sheet, then the following provisions in this Section 10.1(a) shall apply.</u></p> <p>(a)(i) <u>(i)</u> If Seller’s Bid Price exceeds the Market Price Referent, Seller may seek a PGC Funding Award from the California Energy Commission, or its successor agency (“CEC”)<u>CEC</u> for an amount (in \$ per MWh) equal to the positive difference derived by subtracting (a) the Market Price Referent (in \$ per MWh) from (b) the Bid Price (in \$ per MWh) (“PGC Fund Amount”). To the extent that Seller seeks such PGC Fund Award, Seller shall use best efforts to comply with all funding criteria and obtain the PGC Fund Amount and Buyer shall reasonably support Seller’s efforts. If Seller does not obtain a PGC Funding Confirmation or PGC Funding Award by 11:59 p.m. Pacific Standard Time on the 120th day from the date on which Buyer files this Transaction<u>Agreement</u> for CPUC Approval (“Funding Termination Deadline”), then Seller may unilaterally terminate this Transaction prior to the Funding Termination Deadline effective as of the date on which Buyer receives Seller’s written notice of termination. If Seller exercises this termination right, neither Buyer nor Seller shall be subject to liability of any kind.</p> <p>(b)(ii) <u>(ii)</u> At any time prior to the Funding Termination Deadline, if applicable, Seller shall send to Buyer within ten (10) days of (ia) obtaining a PGC Funding Confirmation or PGC Funding Award, written notice of such confirmation or award and a copy of the final funding award agreement entered into by the California Energy Commission, or its successor agency (“CEC”)<u>CEC</u> and Seller, if the funding award agreement has been granted at that time, or (iib) receiving written notice from the CEC denying Seller’s application for the requested PGC Fund Amount , a copy of</p>	<p><u>Issues:</u> On its face, this provision is only applicable if the price exceeds the Market Price Referent; for contracts with lower pricing, inclusion of the provision is confusing and unnecessary, and should be omitted. Under current law, this provision is also applicable only to RPS solicitation contracts, and not to bilateral or short-term contracts, and should be omitted from such contracts as well. The Legislature is considering substantial changes to Public Goods Charge (“PGC”) funding under SB 1036, which would render these provisions inapplicable and confusing. Even if PGC funding is not changed, Petitioners desire the flexibility to ensure stability of contract pricing and other terms by allowing contingent remedies other than a seller’s termination right in the event that PGC funding is not as anticipated, which may well be preferable to sellers and would be subject to the seller’s agreement. Non-substantive, conforming changes have been made to this provision.</p> <p><u>Proposal:</u> Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>

ATTACHMENT C

		<p>such notice and a written statement from Seller, in which Seller shall (AI) waive its termination rights under this Section —10.1(a) or (BII) notify Buyer that the Transaction is terminated, pursuant to the terms of this ConfirmationAgreement. If Seller has the right to terminate this Transaction, but fails to send written notice of termination by the Funding Termination Deadline, then Seller’s termination right per this Section —subsection 10.1(a) shall be deemed waived in its entirety.</p> <p>“Bid Price” means the price as bid by Seller in response to the RFP or such other price as may be arrived at through negotiation.</p> <p>“Market Price Referent” means the market price referent applicable to this Agreement, as determined by the CPUC in accordance with Public Utilities Code Section 399.15(c).</p> <p>“Public Goods Charge Funding” or “PGC Funds” means any supplemental energy payments, pursuant to Public Utilities Code Section 399.15, as shallmay be modified or amended from time to time.</p> <p>“PGC Funding Award” means the final award of allocated PGC Funds from the CEC to Seller, pursuant to Section {25743(a) of the <u>California</u> Public Resource Code}, as shall be modified or amended from time to time.</p> <p>“PGC Funding Confirmation” means a written notice from the CEC to theSeller acknowledging Seller’s request for PGC Funds and the availability of such funds for Seller in a future PGC Funding Award.</p> <p>“PGC Funding Termination Event”2. <u>If “PGC Funding Termination Event” is specified as being “Applicable” on the Cover Sheet, then the following provisions in this Section 10.1(b) shall apply:</u></p> <p>(a) PGC Funding Revocation. If at any time after Seller obtains a (i) <u>PGC Funding Confirmation or PGC Funding Award, (iA) the PGC Funding Confirmation or PGC Funding Award is revoked in whole or in part by the CEC for reasons not caused by Seller’s action or inaction, (iiB) such revocation occurs prior to the issuance of a PGC Funding Award or during the term of the PGC Funding Award, and (iiiC) Seller has not received a financial benefit in the form of tax credits or any other source of public funding or credit directly related to the Product sold under this</u> ConfirmationAgreement, which benefit would offset the loss incurred from the revocation of the PGC Funding Confirmation or PGC Funding Award, then Seller shall have the right to terminate this Transaction, subject to Buyer’s Right of First</p>	
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ATTACHMENT C

		<p>Refusal Option. If Seller exercises this termination right neither Buyer nor Seller shall be subject to liability arising from such termination.</p> <p>Not more than ten (10) days from the Seller’s receipt of written notification regarding revocation of the PGC Funding Confirmation or PGC Funding Award in whole or part, Seller shall notify Buyer in writing of the revocation of the PGC Funding Confirmation or PGC Funding Award, certify it has not received an offsetting financial benefit per clause (iiiC) above, and certify that such revocation is not due to Seller’s action or inaction. Seller shall also provide Buyer with a copy of such CEC notification- (“Revocation Notice”). Seller shall specify in its Revocation Notice what percentage of lost PGC funding it is willing to accept to continue to perform under this Transaction (not exceeding 100%).</p> <p>(b) <u>(ii)</u> <u>Right of First Refusal Option.</u></p> <p>(i)<u>A</u> <u>Option.</u> Buyer, in its sole discretion, shall have the right, but not the obligation, to pay to Seller the percentage of lost PGC funding specified in its Revocation Notice (“Lost PGC Funds”) and Seller shall continue performing under the Transaction for the remaining term of the Transaction (the “Option”). Buyer shall have 30 days from its receipt of the Revocation Notice to exercise the Option (“Exercise Period”), subject to Option Approval, as defined below.</p> <p>(ii)<u>B</u> <u>Exercise of Option.</u> If Buyer chooses to exercise the Option, Buyer shall send written notice to Seller stating that Buyer is exercising the Option, conditioned upon Buyer’s receipt of Option Approval, as defined below, within 180<u>one hundred eighty</u> days of <u>the</u> date on which Buyer received the Revocation Notice. The effectiveness of the Option exercise shall be subject to Buyer’s receipt of a final, non-appealable order issued by the CPUC, satisfactory to Buyer, approving Buyer’s exercise of the Option and recovery of costs associated with the payment of the percentage of lost PGC Funding (“Option Approval”). The date on which Buyer provides written notice of its Option exercise to Seller shall be the “Exercise Date.” Buyer shall file an advice filing or application seeking the Option Approval within 30<u>thirty</u> days of the Exercise Date.</p> <p>(iii)<u>C</u> <u>Payment.</u> Prior to Buyer’s receipt of Option Approval, Buyer shall pay Seller the Lost PGC Funds, which would have been due to Seller on a monthly basis for the period between the Exercise Date and the next invoice following the date on which the Option Approval is issued. Upon receipt of Option Approval, Buyer shall continue</p>	
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ATTACHMENT C

		<p>paying Seller’s Lost PGC Funds on a monthly basis until the expiration of the term of Seller’s PGC Funding Award, or Reinstatement of Seller’s PGC funding, whichever comes first.</p> <p>(iv<u>D</u>) <u>Seller’s Termination Right</u>. Seller may terminate the Transaction in accordance with subsection (a<u>b</u>)(i) above upon the occurrence of any of the following events: (A<u>I</u>) Buyer provides written notice to Seller rejecting the exercise of the Option, (B<u>II</u>) the Option expires without being exercised, (C<u>III</u>) Buyer fails to seek Option Approval within 30<u>thirty</u> days of the Exercise Date, or (D<u>IV</u>) Buyer fails to obtain Option Approval within 180<u>one hundred eighty</u> days of Buyer’s receipt of the Revocation Notice. If Seller then terminates the Transaction, such termination shall be effective 30<u>thirty</u> days from the date on which Seller notifies Buyer of such termination. Both Parties shall continue to perform under this Transaction until the effectiveness of any such termination by Seller.”</p> <p>(e<u>iii</u>) <u>Reinstatement of PGC Funding</u>. If the PGC Funding Award is reinstated in its entirety, including retroactive payments for lost<u>Lost</u> PGC Funds, at anytime before (i<u>A</u>) Seller’s termination of this Transaction or (ii<u>B</u>) Buyer’s exercise of the Option, then Seller shall no longer be permitted to terminate this Transaction, pursuant to <u>this</u> Section —(a)10.1(b)(i), and both Parties shall continue to perform under this Transaction. If the PGC Funding Award is reinstated in whole or in part at anytime after Buyer has exercised the Option, then Buyer shall be relieved of all further obligations to pay any of Seller’s lost<u>Lost</u> PGC Funds, which will be covered by the reinstated PGC Funding Award. If PGC Funding Award is reinstated in whole or in part on a retroactive basis after Buyer has exercised the Option, then Buyer shall have the right to offset against payments due to Seller that portion of such award amount equivalent to the lost<u>Lost</u> PGC Funds paid by Buyer to Seller between the period in which the PGC Funds were revoked and reinstated. Seller shall notify Buyer in writing of any such reinstatement of PGC Funds within 10<u>ten</u> days of receiving notice of such reinstatement from the CEC, CPUC, or other regulatory agency responsible for the PGC Funds program, which notice shall include a copy of the such notice.</p>	
4	Confidentiality	<p>Neither Party shall disclose the non-public terms or conditions of this Agreement or any Transaction hereunder to a third party, other than (i) the Party’s employees, lenders, <u>investors</u>, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential, (ii) for disclosure to the Buyer’s Procurement Review Group, as defined in CPUC Decision (D), 02-08-071, subject to a confidentiality agreement, (iii) to the</p>	<p><u>Issues</u>: The purpose of these provisions is to set forth the confidentiality requirements for the agreements in accordance with the applicable rules. The utilities are required to comply with the CPUC’s and Legislature’s confidentiality rules. These requirements may change over time necessitating revision of these provisions. For</p>

ATTACHMENT C

	<p>CPUC under seal for purposes of review, (iv) disclosure of terms specified in and pursuant to Section 10.12<u>10.8</u> of this Agreement; (v) in order to comply with any applicable law, regulation, or any exchange, control area or ISO<u>CAISO</u> rule, or order issued by a court or entity with competent jurisdiction over the disclosing Party (“Disclosing Party”), other than to those entities set forth in subsection (vi); or (vi) in order to comply with any applicable regulation, rule, or order of the CPUC, CEC, or the Federal Energy Regulatory Commission<u>FERC</u>. In connection with requests made pursuant to clause (v) of this Section 10.11<u>10.7</u> (“Disclosure Order”) each Party shall, to the extent practicable, use reasonable efforts: (i) to notify the other Party prior to disclosing the confidential information and (ii) prevent or limit such disclosure. After using such reasonable efforts, the Disclosing Party shall not be: (i) prohibited from complying with a Disclosure Order or (ii) liable to the other Party for monetary or other damages incurred in connection with the disclosure of the confidential information. Except as provided in the preceding sentence, the Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.</p> <p>“RPS Confidentiality. Notwithstanding Section 10.11<u>10.7</u> of this Agreement, at any time on or after the date on which the Buyer makes its advice filing letter seeking CPUC Approval of the<u>this</u> Agreement, either Party shall be permitted to disclose the following terms with respect to such Transaction: Party names, resource type, delivery term, project location, and project capacity. If Option B is checked on the Cover Sheet, neither Party shall disclose party name or project location, pursuant to this Section 10.12, until six months after such CPUC Approval.<u>Delivery Term, Project location, Contract Capacity, anticipated Commercial Operation Date, Contract Quantity, and Delivery Point.</u>”</p> <p>The Cover Sheet of the Agreement shall be amended by adding to<u>as shown below by revising</u> Article 10, Confidentiality, a new “Option B,” as follows:</p> <div><div><input type="checkbox"/> “Confidentiality Applicable. Option B – RPS Confidentiality Applicable.</div><div>If not checked, inapplicable.”</div><div><input type="checkbox"/> Option C Confidentiality Notification: If Option C is checked on the Cover Sheet Seller has waived its right to notification in accordance with Section 10.11<u>10.7</u>(v).”</div></div>	<p>example, SB107 recently changed the confidentiality requirements for RPS PPAs. As a result, the CPUC conducted a process to formally adopt the modifications to these provisions, as reflected in the redline.</p> <p>Parties may wish to make further changes to confidentiality provisions, such as specific forms, content and times of notice to counterparties in the event of disclosure, that are not adverse to any Commission interest, although such modifications would arguably be “substantive” and thus currently prohibited. Such changes could be placed in a separate provision, but this would be counter to good commercial contracting practices, which require provisions affecting the same subject to be within the same provisions to avoid contract administration difficulties.</p> <p>This term does not need to be standardized to ensure that the interests of customers, the State and the counterparties are protected. As long as the confidentiality rules are met, the CPUC's objectives are satisfied and the provision need not be a non-modifiable standard term. This approach would allow any future changes to the confidentiality rules to be easily incorporated in RPS agreements without the delay caused by a proceeding to modify the language.</p> <p><u>Proposal</u>: Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>
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ATTACHMENT C

5	Contract Term	<p>“Delivery Term: The Parties shall specify <u>and agree to</u> the period of Product delivery for the “Delivery Term,” as defined herein, by checking one of the following boxes:</p> <p>Delivery shall be for a period of ten (10) years<u>Contract Years</u>.</p> <p>Delivery shall be for a period of fifteen (15) years<u>Contract Years</u>.</p> <p>Delivery shall be for a period of twenty (20) years<u>Contract Years</u>.</p> <p>Non-standard Delivery shall be for a period of ____ years.<u>Contract Years</u>.</p> <p><i>[If the “Non-Standard Delivery” contract term is selected, Parties need to apply to the CPUC justifying the need for non-standard delivery.]</i></p>	<p><u>Issues:</u> The only requirement for this provision should be that it meets the Commission's requirements for contract length. The exact language of this provision, however, need not be standardized to meet this objective. This approach would only result in delays as new or changed requirements would need to be incorporated in the provision through additional Commission action.</p> <p>For example, the short-term/bilateral MPR phase will address the terms of contracts the utilities can solicit and the approval process. The outcome of this proceeding may result in the need to delete the non-standard delivery provision in certain contracts. It would not be appropriate to include this language, if the utility is not required to seek specific approval for a short-term contract.</p> <p>The standardization also does not work because the term must be consistent with the remainder of the agreement. For example, PG&E has been required to make conforming changes to this provision. PG&E has replaced the words "contract term" with the defined "delivery term" in the first sentence of the second paragraph, to avoid confusion with the term of the agreement, which is for period longer than the energy delivery period. The defined "delivery term" identifies the number of contract years during which energy is provided under the agreement and better matches the intent of the provision. PG&E also replaced years with the defined term "Contract Years" to ensure consistency. This defined term is a 12 month consecutive period following the date on which the energy deliveries commence. If this provision had not been conformed, it may have created confusion that the reference was to calendar year, which would not have accurately reflected the number of years in the Delivery Term (unless the contract happened to commence on January 1 of each year).</p> <p><u>Proposal:</u> Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>
6	Eligibility	<p>10.2(xiii) [Party — or Seller], and, if applicable, its successors, represents and warrants <u>that</u></p>	<p><u>Issues:</u> This provision has caused substantial confusion among RPS</p>

ATTACHMENT C

		<p>throughout the term of the Delivery Term of each Transaction entered into under this Agreement that: (a) the Unit(s)<u>Project</u> qualifies and is certified by the CEC as an Eligible Renewable Energy Resource (“ERR”) as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (b) the Unit(s); and (ii) the <u>Project’s</u> output delivered to [Party __, or Buyer] qualifies under the requirements of the California Renewable<u>Renewables</u> Portfolio Standard.”</p>	<p>sellers regarding the standards that apply to representations to maintain eligibility. This provision does not provide comfort to sellers and their financiers regarding the applicable standards at the time that the representation is made. Clarifications would further, and not be at all inconsistent, with the Commission’s express intent to avoid chilling renewable energy project financing. The concept of eligibility remains important and must be included in RPS contracts, but requiring the precise language needed to do so is unnecessarily restrictive.</p> <p>PG&E is currently maintaining this provision in a form consistent with D.04-06-014 along with the definition of ERR, but has further modified the provision in this attachment to reflect changes that are at a minimum necessary to clarify the provision. Please note that the associated definition of ERR is consistent with D.04-06-014, pp. 13-14 which request certainty of the applicable law at the time that the representation is made by seller. The proposed definition of ERR is: “Eligible Renewable Energy Resource” or “ERR” has the meaning set forth in the California Public Utilities Code Section 399.12 and California Public Resource Code Section 25741, as either code provision is amended or supplement from time to time, provided that for purposes of Section 10.2(b), the code provisions shall not be amended or supplemented from time to time with respect to the definition of Eligible Renewable Energy Resource.</p> <p><u>Proposal</u>: Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>
16	Assignment	<p>Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof to its financing providers and the financing provider(s) shall assume the payment and performance obligations provided under this Agreement with respect to the transferring Party provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and</p>	<p><u>Issues</u>: The conditions under which the RPS contract may be assigned to a lender under the current term requires that the lender must agree to be bound by the PPA. Sellers have found this unacceptable, as it presents a barrier to financing, including written consent before a developer can enter into a financing arrangement with its lender. This provision is very often unacceptable to sellers, and requires IOUs to consider or provide consent to assignment even prior to the existence of</p>

ATTACHMENT C

		<p>enforceability assurance as the non-transferring Party may reasonably request.</p>	<p>a triggering event.</p> <p>The flexibility to consider these types of financing arrangements in advance and determine with the developer which type of financing would be considered a triggering event of assignment and which types of events are merely financing arrangements, and do not materially change the obligations of the developer. These are changes that enhance RPS contracting, have no impact on the Commission’s interests in RPS, and should not require Commission review and approval nor take up any of its time and resources. Although restrictions on assignment are permissible if agreed to between counterparties, the Uniform Commercial Code as adopted by California limits governmental entities’ ability to require restriction of assignment, and this standard term and condition is not consistent with those limitations, found in Sections 9406(d) and (f) of the Uniform Commercial Code.</p> <p>Sellers have requested the following modifications to this term from SCE: (i) notice of potential seller defaults, an opportunity to cure seller defaults and an extension of cure periods so that the lender can cure the default if it elects to do so; (ii) rights to approve material contract amendments; and (iii) no lender liability for monetary obligations under the contract that are due and owing to SCE as of the date of any lender assumption of the that. SCE has agreed with these terms as reasonable. In return, however, SCE has requested that the lender agree to keep the contract in force, or enter into a new contract with substantially identical terms in the event that a lender or an agent or representative of lender takes control of the project in a foreclosure, workout or bankruptcy scenario. SCE believes that the additional assurance that the contract will remain in force notwithstanding seller financial difficulties has provided substantial value to SCE as well as to sellers and lenders.</p> <p><u>Proposal</u>: Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>
17	Applicable Law	<u>Governing Law</u> . THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES	<u>Issues</u> : Buyers and sellers must ensure that they can revise and update

ATTACHMENT C

		<p>HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW. <u>TO THE EXTENT ENFORCEABLE AT SUCH TIME</u>, EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY LITIGATION ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT.</p>	<p>this provision in accordance with applicable law without the need for a Commission proceeding. The Commission should not and can not require a provision in conflict with California law to be included in RPS agreements pending Commission action on modifications. The type of confusion and ambiguity that results does not serve customers, counterparties nor the integrity of the RPS. Further, no reason exists for the exact language of this provision to be standardized.</p> <p>For example, the California Supreme Court has found pre-dispute waivers of jury trials to be unenforceable under California law. <i>Grafton Partners L.P. v. Superior Court</i>, 36 Cal.4th 944 (2005). Counterparties should have the flexibility to acknowledge this and other changes in California law in this provision.</p> <p><u>Proposal</u>: Petitioners propose elimination of this provision as a standard term and condition, or, in the alternative, that this provision be designated as modifiable and revised as provided in this Attachment C.</p>
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ATTACHMENT D

Proposed Modifications to Findings of Fact, Conclusions of Law & Ordering Paragraphs

Findings of Fact

6. The standard terms and conditions adopted in 2004 were suitable for the initial years of the RPS program.

7. RPS contracting experience of both buyers and sellers has lead them to request reductions in the scope of the initially adopted standard terms and conditions ("STCs"), and additional flexibility for negotiating the STCs.

8. Petitioners' requested relief, and responses thereto, provide a reasonable basis for the Commission to reconsider the scope of the originally-approved STCs and its original decision to designate certain STCs as "may not be modified."

9. Petitioner's requested relief, to designate only the definitions of "Renewable Energy Credit," "Green Attributes," and "CPUC Approval" as not subject to negotiation, provides a reasonable basis for the Commission to eliminate the designation of all other STCs as "may not be modified."

10. The fundamental purpose of "modifiable" STCs is served by the incorporation of *pro forma* RPS contracts within the annual renewable procurement plans required under Pub. Util. Code § 399.14(b).

Conclusions of Law

1. Adoption of standard contract terms and conditions is required by statute, but there is no requirement that standard contract terms and conditions be non-modifiable .

3. The standard contract terms and conditions proposed by the CEERT Parties ~~are~~ were generally reasonable for the initial years of the RPS program, but restriction of standard terms and conditions to the definitions of Renewable Energy Credit, Green Attributes and CPUC Approval and the designation of those terms and conditions as non-negotiable is reasonable and ~~are~~ supported by the record in this proceeding and in R.01-10-024, R. 06-05-027 and R. 06-02-012.

O R D E R

IT IS ORDERED that:

1. The sole standard contract terms and conditions for the California Renewables Portfolio Standard program shall be the definitions of Renewable Energy Credit, Green Attributes and CPUC Approval, and those terms shall not be subject to negotiation between counterparties, ~~as set forth in Appendix A, are adopted~~.

2. The scoping memo for R. 06-05-027 shall be amended to, include, and the scoping memos for any successor proceedings shall include, the review of any changes to standard terms and conditions that are required by law or are otherwise desirable.

3. Any party may, by motion in R. 06-05-027 or any successor proceeding, request consideration of any change to any standard term or condition that the party believes is required by law or otherwise desirable.

4. Each RPS contract may continue to be presented to the Commission for its approval by advice letter.

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the party to the within cause; and that my business address is 77 Beale Street, B30A, San Francisco, California 94105. I hereby certify that I have this day electronically served the foregoing document(s) upon each member of the official service list of **R.04-04-026** pursuant to Rule 2.3 of the California Public Utilities Commission's Rules of Practice and Procedure

**AMENDED PETITION FOR MODIFICATION OF D.04-06-014 OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39-E)
AND SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)
REGARDING STANDARD TERMS AND CONDITIONS REQUIRED
FOR RENEWABLES PORTFOLIO STANDARD CONTRACTS**

on the attached service list, and if no e-mail address was available, the party was served by U.S. Mail. Courtesy copies were also e-mailed to the service lists for R.06-02-012 and R.06-05-027, and if no e-mail address was available, the party was served by U.S. Mail.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 15, 2007, at San Francisco, California.

/s/ Amy S. Yu
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CPUC DOCKET NO. R0404026-R0605027-R0602012 CPUC REV 06-14-07

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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA SERVICE LIST

[R0404026] Downloaded June 15, 2007, last updated on June 13, 2007

Commissioner Assigned: Michael R. Peevey on April 28, 2004; ALJ Assigned: Anne E. Simon on March 24, 2005

ALJ Assigned: Burton Mattson on January 19, 2006

[R0605027] Downloaded June 15, 2007, last updated on June 13, 2007

Commissioner Assigned: Michael R. Peevey on May 26, 2006; ALJ Assigned: Anne E. Simon on November 15, 2006

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Total number of addressees: 353

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